

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

February 23, 2006 Session

**JUDY PESTELL v. RICHARD A. PESTELL**

**Appeal from the Circuit Court for Davidson County**  
**No. 96D-2587     Muriel Robinson, Judge**

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**No. M2005-00749-COA-R3-CV - Filed on August 24, 2006**

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The trial court refused father's request for recovery of child support payments made prior to his petition to modify although the child also received social security disability payments for the period. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Robert A. Anderson, Nashville, Tennessee, for the appellant, Richard A. Pestell.

Judy Pestell did not participate in this appeal.

**OPINION**

**I. FACTS**

Upon their divorce in July of 1997, Richard A. Pestell ("Father") was ordered to pay Judy Pestell ("Mother") \$68.25 per week in child support for their minor son. Thereafter, Father became physically disabled and was awarded social security disability benefits on August 17, 2003. The Social Security Administration found that Father's disability began in May of 2001 and awarded him a lump sum to cover the period between the onset of the disability and the date of the award. Beginning in August of 2003, Mother, as custodial parent for the couple's child, began receiving \$453 per month from Social Security as part of Father's benefits. In addition, the social security award benefitting the parties' child also included a lump sum of \$6,671.25 in retroactive benefits to cover the period between the onset of Father's disability and the date of the award, May 2001 through August 2003. During this time period, Mother had also received the previously ordered child support payments from Father.

In April of 2004, Father petitioned to modify his child support obligations in light of the social security disability benefits received by the Mother on behalf of their son. Specifically, Father requested that his child support obligation be “modified downward or eliminated” since the monthly social security payments received by Mother exceeded his child support obligation. Regarding future child support, the parties entered into an Agreed Order in August of 2004 whereby they agreed that the social security benefits provided to Mother would substitute for Father’s payments. The parties, however, were unable to agree on the effect of the social security benefit received by Mother in the past, which included the lump sum benefit.

After a hearing, the trial court found that it could modify Father’s child support obligation in light of the social security benefits received by the child, but the modification could extend backward only to the date Father filed his petition to modify. The court, therefore, awarded Father a judgment against Mother for \$613.24 representing overpayment of child support for the period while his petition to modify was pending.<sup>1</sup> The trial court, however, refused to allow Father to recover any of the child support paid before the date Father petitioned to modify the support. On this issue, the trial court found that the lump sum social security benefit paid to Mother “is the child’s money and the Father has no claims to that money” and Father should not receive any credit for that amount.

Father appeals claiming that for the period before he filed his petition during which he was retroactively deemed disabled, Father is “entitled to be reimbursed” for child support payments since Mother received a lump sum covering this period. Additionally, he appeals the award of attorney’s fees to Mother. On appeal Father is represented by counsel, but Mother makes no appearance.

## **II. THE EFFECT OF SOCIAL SECURITY DISABILITY PAYMENTS FOR BENEFIT OF CHILD**

It is well settled that social security disability benefits received by the custodial parent may be applied toward child support owed by the disabled parent. *Orr v. Orr*, 871 S.W.2d 695, 696 (Tenn. Ct. App.1993); *Howard v. Howard*, 1987 WL 15083 at \*2 (Tenn. Ct. App. Aug.4,1987)(no Tenn. R. App. P. 11 application filed). Thus, there is no question as to the modification from the date of the petition. The issue presented to us, however, is whether a court can render a judgment against a custodial parent for child support paid prior to the filing of a petition to modify. In this case, the offered justification for such an award is so that Father can receive credit for disability payments made on his behalf while he also made support payments. As reasonable as Father’s justification may sound, we do not believe Father is entitled to a judgment for child support payments that predate the filing of his petition to modify.

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<sup>1</sup>In making the award, the trial court gave Mother credit for amounts it found Father owed Mother including \$500 in attorney’s fees awarded Mother to defend the action. Other than the attorney’s fees award to Mother, these amounts Father owed Mother are not the subject of appeal.

We begin our analysis with *Sherrell v. Sawyer*, No. 87-68-II, 1987 WL 12498 (Tenn. Ct. App. June 19, 1987)(no Tenn. R. App. P. 11 application filed). In *Sherrell*, the father's child support was set at \$15 per week which he paid until September of 1978 when he was hospitalized for a drug overdose resulting in a coma. *Id.* at \*1. The mother received no child support from the father between September 1978 to April 1979. *Id.* Starting in April of 1979, the mother received social security benefit payments on behalf of the children resulting from their father's disability. *Id.* In the meantime, the father was adjudged incompetent and a conservator was appointed. *Id.* It does not appear that the father or anyone on his behalf filed a petition to modify his child support. In 1985, the father received a substantial sum in a malpractice action. *Id.* Apparently in response to the father's receipt of this award, the mother sued to recover unpaid child support. The trial court awarded wife \$8,430 in unpaid child support and declined to give the father a credit for the social security disability payments made for the benefit of the children. *Id.* The sole issue on appeal in *Sherrell* was whether the father was entitled to the credit.

The appellate court found that the father was entitled to credit for the social security disability payments made for the benefit of the children. *Id.* at 6-7. The court relied on *Kipping v. Kipping*, 186 Tenn. 247, 209 S.W.2d 27 (1948) (serviceman's dependents' allowance credited toward child support) and *Freshour v. Aumack*, 567 S.W.2d 176 (Tenn. Ct. App. 1977) (Veterans Administration's payment for support of incompetent children credited toward child support.)

No other relevant Tennessee authorities are found. It is seen, however, that Tennessee Courts have allowed credit against court ordered child support for government support payments for dependents of a parent employed in the armed forces and for dependents of a disabled veteran. In the first instance, the serviceman contributed part of the amount paid by the government. In the second instance, the veteran made no contribution.

*Id.* at \*2.

The court then discussed authorities from other jurisdictions. As part of this examination, the court noted a minority view that a credit for social security payments is allowed only for the period following a request to modify. *Id.* at \*6. However, the court in *Sherrell* elected to follow the majority rule and allowed a credit to extend before any petition to modify was filed. *Id.* at \*6-7.

Father relies on the case of *Howard v. Howard*, 1987 WL 15083 (Tenn. Ct. App. Aug. 4, 1987) (no Tenn. R. App. P 11 application filed) which was decided a few months after *Sherrell*. In *Howard*, the father was responsible for \$200 a month in child support payments. In the summer of 1986, the father's application for social security disability benefits was approved retroactively to January 1, 1985. *Id.* at \*1 The child's mother received a lump sum of \$4,563 representing social security benefits due the child from January 1, 1985, through the summer of 1986. *Id.* Thereafter, in August of 1986, the father filed a motion to have the social security benefits received by the child's mother credited to his child support obligation. The trial court agreed and, in addition to relieving the father of his future child support obligations, also granted the father a judgment of

\$3,800 against the mother giving father credit against his child support for the social security benefits received by the child before the petition to modify was filed. *Id.*

The Court of Appeals in *Howard* affirmed the trial court. *Id.* at \*2. While the court found the father was entitled to a credit, the court drew no distinctions between the periods before and after the father filed to modify child support.

There are no reported decisions from Tennessee's appellate courts addressing the precise issue of whether one who is under an obligation to pay child support, and who thereafter becomes totally disabled, is entitled to receive credit for social security payments made to the ex-spouse for the use and benefit of a minor child. Our courts have held, however, that a parent is entitled to child support credits for payments made to an ex-spouse by the Veteran's Administration, and under the Serviceman's Dependents Allowance Act. See *Kipping v. Kipping*, 186 Tenn. 247, 209 S.W.2d 27 (1948); *Freshour v. Aumack*, 567 S.W.2d 176 (Tenn. App. 1977). As we see no reason Social Security payments, whether monthly or in a lump sum, should be treated differently, we affirm the holding of the trial court. It would be inequitable to hold otherwise.

*Id.* at \*2.

Due to a statutory revision, we do not believe that the decisions in *Sherrell* and *Howard* govern. Whether or not a court can retroactively modify a child support order beyond the filing of a petition to modify cannot be determined without consideration of the March 27, 1987, amendment to Tenn. Code Ann. § 36-5-101, which provided the following language now found in (f)(1):

Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state and shall be entitled to full faith and credit in this state and in any other state. Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties.

This amendment achieved several results, two of which are relevant herein. The Tennessee Supreme Court in *Rutledge v. Barrett*, 802 S.W.2d 604, 606-07 (Tenn.1991), held that the 1987 amendment to Tenn. Code Ann. § 36-5-101(f)(1)<sup>2</sup> "could not be more clear." First, retroactive modification of child support orders is no longer possible. *Id.* Second, the amendment prohibits equitable defenses to enforcement of those orders. *Id.* The Court recognized that, although the effect of the amendment may "seem harsh," its purpose is to ensure that children receive adequate support. *Id.* at 607. After the effective date of Tenn. Code Ann. § 36-5-101(f)(1) in 1987, courts in

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<sup>2</sup>Originally the above quoted statutory provision was in subsection (a)(5) of Tenn. Code Ann. § 36-5-101 but was later moved to subsection (f)(1).

Tennessee have “no power to alter a child support award” for any period before a petition to modify is filed and notice given. *Alexander v. Alexander*, 34 S.W.3d 456, 460 (Tenn. Ct. App.2000).

We conclude that Tenn. Code Ann. § 36-5-101(f)(1) prevents a modification of child support that would require a reimbursement for any period before a petition to modify is filed. The cases relied upon by the court in *Sherrell* and the cases cited in *Howard* were decided before the enactment of above cited language in Tenn. Code Ann. § 36-5-101(f)(1). Likewise, this revision also was not in effect when the trial courts heard *Sherrell* and *Howard*. Furthermore, the statutory revision was not discussed in either opinion, leading to the conclusion that the courts were not apprised of the recent amendment. By the enactment of Tenn. Code Ann. § 36-5-101(f)(1), the legislature has clearly decided that a court may not alter pre-petition child support obligations. This is true even if it appears unfair or inequitable to one of the parties. There are a number of situations where “fairness” might compel one to adjust child support yet the legislature clearly decided that once the obligation to pay is ordered, then it may not be modified retroactively prior to the date a petition to modify is filed and served.

In *Duckett v. Duckett*, No. 03A01-9506-CV-00198, 1996 WL 57943 (Tenn. Ct. App. Feb.13, 1996), the court recognized the effect of Tenn. Code Ann. § 36-5-101(f)(1) on this issue. In *Duckett*, the father sought credit on his child support payments for amounts he paid to others for the benefit of his son. In *Duckett*, father relied on *Freshour* as did the courts in *Sherrell* and *Howard*. Among the reasons provided by the court in *Duckett* why father was not entitled to credit, the court found:

... even if we were to construe the judgment in *Freshour* as approving a retroactive modification of a child support award (which we are not inclined to do), that case was decided before the enactment of the quoted part of [Tenn. Code Ann. § 36-5-101(f)(1)]. When *Freshour* was decided, a trial court had discretion to retroactively modify a child support obligation. See *Crane v. Crane*, 170 S.W.2d 663, 665 (Tenn. App. 1942).

*Id.* at \*3.

Father argues that requiring Mother to reimburse him for payments he made during the disability period is a “credit” and not a reimbursement or alteration of a prior order. Regardless of how he characterizes it, the relief sought by Father is reimbursement of amounts he paid Mother as required by a child support order. Because Father was under a court order to pay child support during the time period at issue, his request amounts to a request to retroactively modify that order since it would relieve him of the obligation to pay child support. The trial court correctly found it did not have the authority to alter its child support order retroactively, and Father has not provided grounds to disturb that judgment.

Courts have allowed a credit on child support arrearages if the obligor parent paid for “necessaries that the custodial parent either failed to provide or refused to provide. *Johnson v. Johnson*, Case No. E2003-00130-COA-R3-CV, 2003 WL 22258180, at \*4 (Tenn. Ct. App. Sept.29,

2003)(no Tenn. R. App. P. 11 application filed). Credit for the provision of necessities has been held not to violate Tenn. Code Ann § 36-5-101(f)(1) because a credit in that circumstance is not a modification, rather “the credit recognizes that the obligor parent provided the support the court ordered in the first place.” *Peychek v. Rutherford*, Case No. W2003-01805-COA-R3-JV, 2004 WL 1269313, at \*4 (Tenn. Ct. App. June 8, 2004)(no Tenn. R. App. P. 11 application filed)(citing *Netherton v. Netherton*, Case No. 01A-01-9208-PB00323, 1993 WL 49556, at \*2 (Tenn. Ct. App. Feb.26, 1993) (no Tenn. R. App. P. 11 application filed). This principle has no applicability in this matter because there is no dispute about the amount of child support owed and paid by Father. Father does not seek credit for necessities he provided to his child but, instead, a “refund” to him of support payments he made. In effect, Father wants the child support order retroactively altered to allow the disability payments to substitute for his payments.

We do not believe our decision today is inconsistent with *Orr v. Orr*, 871 S.W.2d 695 (Tenn. Ct. App.1994). In *Orr*, the court allowed a father credit on future child support obligations based on social security benefits received by the child before a petition to modify was filed. *Id.* at 696. The father did not seek reimbursement from the custodial parent for retroactive social security benefits received on behalf of the child before father’s petition to modify. *Id.* at 696. Instead, the father in *Orr* asked that he receive credit for that amount in the future if the social security benefits ceased and he was forced to resume payments. *Id.* There was no request to modify child support prior to the petition to modify. Therefore, the father’s request in *Orr* was not prohibited by Tenn. Code Ann. § 36-5-101(f)(1).

### **III. ATTORNEYS FEES**

Father appeals the award of attorney’s fees totaling \$500. Father admits that their divorce decree provided that if one of the parties had to enforce the Marital Dissolution Agreement then reasonable attorney’s fees were available. The issue is whether the trial court abused its discretion. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn.1995). Based on the record before us we find no such abuse of discretion.

We find that Father’s request for a retroactive credit on his child support payments effective before his petition to modify was filed is prohibited by Tenn. Code Ann. § 36-5-101(f)(1). The judgment of the trial court is affirmed. Costs are assessed against Richard Pestell for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE